ORIGINAL

NO. 87-5505

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DARRELL GENE DEVIER,

Petitioner,

v.

RALPH KEMP, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to examine the denial of a certificate of probable cause to appeal to the Supreme Court of Georgia where the underlying state court decision found that the allegation raised herein had been previously raised on Petitioner's direct appeal and therefore was precluded from a second review under state procedural guidelines?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Darrell Gene Devier, was convicted in the Superior Court of Floyd County of the murder and rape of Mary Frances Stoner. The Petitioner was sentenced to death for both crimes. On Petitioner's subsequent direct appeal to the Supreme Court of Georgia regarding these convictions and sentences, the judgment and verdict of the Superior Court of Floyd County was affirmed on November 29, 1984. Devier v. State, 253 Ga. 604, 323 S.E.2d 150 (1984). This Court then declined to grant the Petitioner's petition for a writ of certiorari to review this decision by the Supreme Court of Georgia. Devier v. Georgia, ___ U.S. ___, 105 S.Ct. 1877 (1985).

On June 21, 1985, the Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, raising approximately thirteen separate allegations.

After an evidentiary hearing before the state habeas corpus held on February 11, 1986, the petition for state habeas corpus relief was denied on March 30, 1987. On June 18, 1987, the Petitioner's application for a certificate of probable cause to appeal this denial of state habeas corpus relief to the Supreme Court of Georgia was also denied and this petition for a writ of certiorari now follows.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASON FOR NOT GRANTING THE WRIT

I. NO FEDERAL CONSTITUTIONAL ISSUE IS PRESENTED FOR REVIEW IN THIS PETITION FOR A WRIT OF CERTIORARI.

The Petitioner here is attempting to challenge the denial of habeas corpus relief in this case based solely upon an issue which was previously raised on the Petitioner's direct appeal. Respondent submits that under Georgia procedural rules, such previously decided issues cannot be reconsidered by the lower state habeas corpus court and this principle of state law was the basis of the state habeas corpus court's decision on this point. As such, this application of an adequate and independent state law ground for the denial of habeas corpus relief demonstrates that there is no federal constitutional issue presented in this petition for a writ of certiorari. Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

In paragraphs 70-71 of the original habeas corpus petition, the Petitioner alleged a violation of his Eighth and Fourteenth Amendment Rights by the introduction at the sentencing phase of his trial of testimony of a woman that Petitioner had previously raped. The Supreme Court of Georgia on direct appeal summarized the facts as following:

> Ms. Elrod testified that on June 2, 1979, she had been raped by Devier. She explained that she had known him for many years; that Devier had even lived in her home for a period of time. On the day in question, she and Devier had left her house in his car to go smoke some marijuana. They got into an argument and he asked her if he did not owe her "some licks from yesterday." She testified that he grabbed her, threw her into the back seat, and made her undress. Then, she testified, that they had "sexual intercourse" without her consent.

Devier v. State, 253 Ga. 604, 618(9), 323 S.E.2d 150 (1984). Petitioner challenged the admissibility of this evidence at the sentencing phase, but the Supreme Court of Georgia rejected this challenge noting that:

> On the issue of sentence, however, "the trier of fact must make a determination as to the sentence to be imposed, taking into consideration all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character. [Cits.] Any lawful evidence which tends to show the motive of the defendant, his lack of remorse, his general moral character, and his pre-disposition to commit other crimes is admissible in aggravation, subject to the notice provisions of the statute." (Citations omitted).

Id. at 618-19. The Supreme Court of Georgia then found that no statutory or constitutional bar to the introduction of this evidence. Id. at 619.

The state habeas corpus court when faced with this same issue raised in the state habeas corpus petition regarding Ms. Elrod's testimony did not reach any of the merits of the Petitioner's claims of constitutional infirmity in the introduction of this evidence. (See state habeas corpus court order, pp. 17-18). Instead, after noting that the Supreme Court of Georgia had addressed this issue on direct appeal, the state habeas corpus court concluded:

> Issues decided on direct appeal cannot be re-asserted in habeas corpus proceedings. Hammock v. Zant, [243 Ga. 259, 253 S.E.2d 727 (1979)].

Id. at 18. As such, it is clear that the state habeas corpus court based this determination of the Petitioner's allegations solely upon an interpretation of Georgia law, not of any federal constitutional principle.

The principle that a state habeas corpus court is precluded from reviewing issues previously raised on direct appeal is a well-settled principle of Georgia law. See Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974); Brown v. Ricketts, 233 Ga. 809, 810-11(1), 213 S.E.2d 672 (1975); Gunter v. Hickman, 256 Ga. 315, 316(1), 348 S.E.2d 644 (1986). As the Supreme Court of Georgia noted in Brown v. Ricketts, supra at 811, a writ of habeas corpus is not a means for a second appeal under Georgia law and after review by an appellate court, the same issues cannot be reviewed in habeas corpus. The appellate courts exist to review appeals and it is not the function of state habeas corpus courts to review issues already decided by an appellate court and it is not the function of the appellate court to review, on the denial of the writ of habeas corpus, issues previously decided on direct appeal. Id. The Supreme Court of Georgia also noted in Brown:

> One review on the merits, whether on habeas corpus or on appeal of conviction, is sufficient, where neither facts nor law has changed.

Id.

As the Petitioner in the instant case demonstrated no such change in either the law or the facts to the state habeas corpus court in its review of the issue of Ms. Elrod's testimony, the state habeas corpus court was bound by the state procedural guideline not to review this issue previously raised on direct appeal. This decision involved no application of federal constitutional principles.

CONCLUSION

Therefore, this Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no federal question for review by this Court as to Petitioner's claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DENNIS R. DUNN, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition upon counsel for the Petitioner by depositing a copy of the same in the United States mail with proper address and adequate postage to:

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